

STATE OF MICHIGAN  
COURT OF APPEALS

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HORIZON BANK NATIONAL ASSOCIATION,

Plaintiff-Appellee,

v

CHEMICAL BANK SHORELINE,

Defendant/Third-Party Plaintiff-  
Appellant,

and

METROPOLITAN TITLE COMPANY,

Third-Party Defendant.

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UNPUBLISHED

July 19, 2011

No. 295585

Van Buren Circuit Court

LC No. 08-057862-CH

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

In this dispute over a purported agreement between two lenders to discharge a mortgage, defendant appeals as of right the trial court's order that granted summary disposition in favor of plaintiff. For the reasons set forth below, we reverse and remand.

We first address defendant's unpreserved allegation of error that the trial court failed to apply the common law rule to discharge a future advance mortgage. The trial court did not specify whether it granted plaintiff's motion pursuant to MCR 2.116(C)(8) or (10); however, because the trial court essentially found that an enforceable contract did not exist, it appears to have granted the motion pursuant to MCR 2.116(C)(8). We review de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether an instrument created a future advance mortgage presents a question of law subject to de novo review. *Citizens State Bank v Nakash*, 287 Mich App 289, 292; 788 NW2d 839 (2010). Unpreserved allegations of error are reviewed for plain error affecting the party's substantial rights. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 31; 772 NW2d 801 (2009).

"[A] mortgage to cover future advances is valid," and the parties' intent to secure future indebtedness is ascertained by the instrument. *Citizens' Savings Bank v Kock*, 117 Mich 225,

226; 75 NW 458 (1898). At the outset, defendant incorrectly framed the issue as one involving the common law. MCL 565.901 *et seq.* governs “the priority of a mortgage that secures an indebtedness or other obligation that arises or is incurred after the mortgage has been recorded.” A “future advance mortgage” is “a mortgage that secures a future advance and is recorded either prior to or after the effective date of this act.” MCL 565.901(b). A “future advance” is “an indebtedness or other obligation that is secured by a mortgage and arises or is incurred after the mortgage has been recorded, whether or not the future advance was obligatory or optional on the part of the mortgagee.”

In this case, Evan and Dorrie Knoll executed an instrument entitled “future advance mortgage,” which granted defendant mortgages on three parcels of real property to secure in part “[p]ayment of loans, advances (including future advances) and/or other credit facilities made or to be made by [defendant] in the aggregate principal amount of \$1,100,000.00, together with interest thereon and other sums owing or to become owing in connection therewith.” The advance mortgage also secured

ALL OTHER EXISTING AND FUTURE OBLIGATIONS OF MORTGAGOR TO [DEFENDANT], WHETHER OR NOT SUCH OBLIGATIONS ARE INCLUDED ABOVE, including, but not limited to, payment and performance of the provisions of this Mortgage; payment of all advances (including future advances), made or to be made by [defendant]; payment and performance of all notes, undertakings, obligations, debts, liabilities, agreements, applications or agreements for issuance of letters of credit, assignments, guarantees, or promises of or by the Mortgagor to or with [defendant], whether due, existing or arising, now or in the future, absolute or contingent, direct or indirect, however arising or acquired by [defendant], and including obligations originally owing by the Mortgagor to a third party and assigned by such third party to [defendant]; payment and performance of all existing and future obligations (including the kinds of obligations described above) to [defendant] of any persons or entities for which the Mortgagor is or becomes an accommodation party, surety or guarantor or whose obligations this Mortgage is given to secure; and all extensions, renewals and modifications of the foregoing. If more than one person appears as the Mortgagor above, the Liabilities shall include, without limitation, all of the foregoing joint, several and individual obligations of each such person to [defendant]. Mortgagor agrees that if the proceeds of any of the Liabilities created in the future are utilized to pay and/or renew any of the Liabilities existing at this time, such future Liabilities shall be presumed to be renewals or extensions of such existing Liabilities.

A review of the foregoing demonstrates the parties’ intent to secure future indebtedness. *Citizens’ Savings Bank*, 117 Mich at 226. The instrument executed by the parties created a valid future advance mortgage. *Id.* Unlike *Citizens State Bank*, 287 Mich App at 292, the instant instrument expressly created a future advance mortgage, and it is undisputed that defendant’s mortgage was recorded. The future advance mortgage in this case was not paid off or otherwise satisfied where the debt was not paid off and the future advances were not terminated. *Deutsche Bank Trust Co Americas v Spot Realty, Inc*, 269 Mich App 607, 614; 714 NW2d 409 (2006). As such a plain error resulted below because the trial court failed to apply the correct law and did

not recognize that this case involved a future advance mortgage. Moreover, a dispute exists in this case whether defendant's representatives agreed to discharge defendant's mortgage on the subject property. Here, the plain error affected defendant's substantial rights in this case, where a legitimate dispute exists whether defendant is entitled to funds at issue. *Liparoto Constr, Inc*, 284 Mich App at 31.

On appeal, defendant makes no argument that it is entitled to retain the funds paid by plaintiff. However, such argument is implicit where defendant asserts that it has no obligation to discharge its mortgage on the subject property. Plaintiff argues on appeal that *Deutsche Bank Trust Co Americas*, 269 Mich App at 607, only stands for the proposition that a bank is not "obligated to discharge its mortgage when the borrower does not provide a written request to terminate his credit line." Plaintiff therefore asserts that defendant may not retain the funds. We disagree. The ruling in *Deutsche Bank Trust Co Americas*, 269 Mich App at 614, is critical to this case and if defendant never intended to discharge its mortgage on the subject property, then it prevails in this case and may retain the funds paid by plaintiff. Ultimately, this case boils down to a credibility determination for the jury to ascertain what the parties intended to do regarding the discharge of defendant's mortgage on the subject property.

We hold that the trial court erroneously granted summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(8), where further factual development could possibly justify recovery on the part of defendant. See *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Moreover, we conclude that summary disposition pursuant to MCR 2.116(C)(10) would not be appropriate, because after viewing the record in the light most favorable to the defendant, there remains an issue upon which reasonable minds could differ, namely whether defendant's representatives agreed to discharge defendant's mortgage on the subject property. See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Next, defendant claims that the trial court ignored the law when it determined that if there was no meeting of the minds between the parties regarding the discharge of the future advance mortgage, then plaintiff was entitled to the refund. Our starting point is whether a valid contract exists. A valid contract contains the following the essential elements: (1) parties competent to contract, (2) proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). We have previously explained the mutuality of agreement element as "mutual assent or a meeting of the minds on all the essential terms." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006). An objective test is used to determine whether a meeting of the minds resulted, based on the express words of the parties and their visible acts. *Id.* at 454.

In this case, plaintiff sought a discharge of defendant's mortgage on the subject property in exchange for an express sum of cash, \$250,563. As discussed *infra*, such transaction does not require a writing. It was undisputed that the parties were competent to contract, and that a proper subject matter was involved. See *Hess*, 265 Mich App at 592. Plaintiff also submitted more than \$250,000 to defendant as purported consideration to discharge defendant's mortgage on the subject property. However, the mutuality elements are at issue. The trial court concluded that there was no "meeting of the minds." Here, plaintiff sought to obtain the first priority lien on the subject property, which required defendant to discharge its existing mortgage on said property. Defendant's representative indicated that defendant would not discharge its mortgage. A

question of fact exists whether a meeting of the minds occurred in this case. The actions of plaintiff's representatives suggests that there was some sort of understanding to discharge the mortgage, otherwise it seems implausible that plaintiff would have made the loan to the Knolls and tendered more than \$250,000 to defendant. See *Kloian*, 273 Mich App at 454. Certainly, there is a credibility determination for the jury in this case. See *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008).

Plaintiff essentially argues on appeal that a question of fact existed whether defendant intended to discharge its mortgage on the subject property; however, plaintiff believes that such question was not material where the trial court concluded that there was no contract and defendant was not entitled to retain the funds or must discharge its mortgage. We disagree. The underlying question of fact regarding defendant's intent to discharge the mortgage is essential to resolve this case. As such, a genuine issue of material fact existed. If defendant intended to discharge the mortgage, then the future advance mortgage with respect to the subject property should be discharged. If defendant did not intend to do so, then it is entitled to retain the funds under *Deutsche Bank Trust Co Americas*, 269 Mich App at 614, without discharging the mortgage. Plaintiff's assertion that defendant is not entitled to retain the funds is contrary to the foregoing authority.

Because a question of fact existed whether defendant intended to discharge its mortgage on the subject property in exchange for \$250,563, the trial court erroneously granted summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(8). See *Feyz*, 475 Mich at 672. Plaintiff was not entitled to summary disposition pursuant to MCR 2.116(C)(10), because a question of fact existed whether a meeting of the minds occurred regarding the discharge of defendant's mortgage on the subject property. See *West*, 469 Mich at 183.

Finally, we reject defendant's argument that the Statute of Frauds applied to the instant case. The applicability of the Statute of Frauds presents a question of law subject to de novo review. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). "[A] mortgage is not an estate in land," but "a lien on real property intended to secure performance or payment of an obligation." *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 256; 761 NW2d 694 (2008). A "lien" is "[a] legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied." Black's Law Dictionary (7th ed.). See also *Fredricks Lumber Co v Evans*, 266 Mich 486, 489; 254 NW 176 (1934) ("A lien upon land is an interest in or charge upon real estate and may be created only by a writing complying with the statute of frauds."). A mortgage is an interest in land, and, therefore, subject to the Statute of Frauds. *Aetna Mtg Co v Dembs*, 13 Mich App 686, 691; 164 NW2d 771 (1968). See MCL 566.106. However, our case law provides that a mortgage may be transferred; paid and extinguished; and cancelled without a writing. *Trombly v Klersy*, 139 Mich 209, 209-210; 102 NW 638 (1905); *Densmore v Savage*, 110 Mich 27, 30; 67 NW 1103 (1896); *Nims v Sherman*, 43 Mich 45, 52; 4 NW 434 (1880).

In this case, there was a purported promise to discharge defendant's mortgage, and such promise was supported by consideration, i.e., plaintiff's payment of \$250,563. *Trombly*, 139

Mich at 209-210. Such transaction does not require a writing. *Id.*; *Densmore*, 110 Mich at 30; *Nims*, 43 Mich at 52.<sup>1</sup> The trial court’s ruling provided that the Statute of Frauds was generally applicable. While technically incorrect, the trial court nonetheless never applied the Statute of Frauds in this case. Ultimately, the Statute of Frauds does not apply to this case involving a purported agreement to discharge a mortgage. *Nims*, 43 Mich at 52.<sup>2</sup>

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer  
/s/ William C. Whitbeck  
/s/ Donald S. Owens

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<sup>1</sup> A cancellation, discharge, or extinguishment of a mortgage are synonymous. A “discharge” is “[t]he payment of a debt or satisfaction of some other obligation”; a “cancellation” is “[a]n annulment or termination of a promise or an obligation”; and an “extinguishment” is “[t]he cessation or cancellation of some right or interest.” Black’s Law Dictionary (7th ed).

<sup>2</sup> We also note that defendant seeks to use the Statute of Frauds to retain the funds paid by plaintiff. It may not do so. Even if the Statute of Frauds applied in this case, a contract that is void under the Statute of Frauds is a nullity. *Jefferson v Kern*, 219 Mich 294, 298; 189 NW 195 (1922). If a contract falls within the Statute of Frauds and one party has performed and the other party received the benefit, the former may maintain an action against the latter for the benefit conferred. *Whipple v Parker*, 29 Mich 369, 374 (1874). Thus, even if the Statute of Frauds applied in this case, defendant would not be entitled to retain the funds transmitted by plaintiff. *Id.*